Chevron Chemical Company *and* Oil, Chemical & Atomic Workers International Union #4-447. Cases 15-CA-6807 and 15-CA-7014

April 9, 1982

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS FANNING, ZIMMERMAN, AND HUNTER

On July 18, 1979, Administrative Law Judge Walter H. Maloney, Jr., issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel refiled with the Board his brief to the Administrative Law Judge.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge only to the extent consistent herewith.[1]

In May 1977, Oil, Chemical & Atomic Workers International Union[2] was certified in a unit of 23 clerical employees at Respondent's Belle Chasse plant (also referred to in the record as the Oak Point plant). The Union also represented Respondent's production and maintenance employees, and technical employees, pursuant to certifications in 1967 and 1968, and Respondent and the Union were parties to successive collective-bargaining agreements covering those employees. Following responses to the Union's request for information concerning the clerical employees, a preliminary bargaining session was held on August 2. Twenty-one further sessions were held from September 14 through February 24, 1978, with another session scheduled for March 2. In the interim, on Sunday, February 26, the Union held a membership meeting to discuss the status of negotiations, and the membership voted to strike. The strike began the following morning, with 15 union members remaining on strike until May 17 when unconditional offers were made to return to work. Respondent by then had permanently filled all but one of the strikers' positions:[3] that position was offered to the Union at that time, and a second offer was made when another position subsequently became available. Employees Perez and Capdeville accepted the offers.

The Administrative Law Judge in his Decision found that Respondent violated Section 8(a)(5) by bargaining in bad faith, or indulging in "surface" bargaining; that the strike was caused or prolonged by such unfair labor practice; and that Respondent consequently violated Section 8(a)(3) of the Act by failing to reinstate all of the former strikers as unfair labor practice strikers. With respect to the 8(a)(5) allegation, the Administrative Law Judge apparently agreed with a theory argued by the General Counsel; i.e., that the Company's proposal of a broad management-rights clause and a no-strike clause, in conjunction with a limited arbitration proposal, was "predictably unacceptable" to the Union. Thus, he concluded, *inter alia*, that Respondent demonstrated a lack of good faith by its initial proposals on September 14, notwithstanding subsequent modifications. The Administrative Law Judge also apparently agreed with a contention of the General Counsel that Respondent's wage offer was far below what a "self-respecting" union could take back to the employees, although it is not entirely clear whether he did so because he viewed the amount of the proposed increase as insufficient in and of itself, or in the context of "rampant inflation," or because Respondent sought to retain the authority to grant merit increases over and above the amount which would be guaranteed for entry and acceptable performance levels in various classifications.

Respondent contends, *inter alia*, that the Administrative Law Judge erred in basing his decision almost entirely on his own evaluation of the sub-

[1] Preliminary to our discussion herein, we note our disagreement with certain of the Administrative Law Judge's findings. We do not adopt his comments concerning purported *per se* violations of Sec. 8(a)(5) as to wage increases. Such matters were not alleged in the complaint or at the hearing, nor were they litigated as alleged violations, and some at least would have been outside the 10(b) period. In our view, the record does not indicate any unilateral salary adjustments between the time of certification and the strike. While some time increases were granted, they appear to have been in line with existing policy; and the record indicates that, although the Union was provided with a list of such on November 11, 1977, it did not question the increases. We do not adopt the Administrative Law Judge's references to Respondent's purportedly refusing to discuss a grievance, inasmuch as the record, in our view, does not support his interpretation. As we conclude that the record does not demonstrate an existing practice of taking 5 days' vacation on a 1-day-at-a-time basis at Oak Point, we decline to adopt the Administrative Law Judge's findings predicated on such a practice. We do not agree with the Administrative Law Judge's conclusion that Respondent's negotiator, Lockwood, displayed a cavalier attitude toward a strike threat on February 24. The record indicates that on that Friday afternoon the Union was considering Respondent's latest proposal, but could not indicate whether a response might be forthcoming that day. And, as further negotiations were already scheduled for the following week, Lockwood informed Union Negotiator Bergeron that he would catch his already scheduled airline flight to his home on the west coast, and would see him the following week. We do not adopt the Administrative Law Judge's criticism of Respondent for purportedly failing to provide the Union, during the negotiations, all justifications of its bargaining posture later presented at the hearing. In this connection we note the Administrative Law Judge's own comments on the record to the effect that such reasons may be material irrespective of whether they were fully expounded to the other party during actual negotiating sessions. We decline to adopt the comments by the Administrative Law Judge in the latter part of his summary of Respondent's bargaining position beginning. "Moreover, the Respondent granted . . ." (ALJD, sec. I,C,11), inasmuch as those comments are, in our view, either not entirely consistent with or unsupported by, the record.

[2] Hereinafter also referred to as OCAW.

[3] No issue exists as to the bona fide nature of the replacements.

stantive terms of Respondent's proposals and his own assessment of whether the parties' economic weapons were "fairly" used, that he incorrectly failed to take into account certain background facts, that he drew certain conclusions which were unsupported by the facts, and that he misapprehended the record evidence in certain respects. We find merit in certain of Respondent's exceptions as discussed below.

Discussion

Determining whether parties have complied with the duty to bargain in good faith usually requires examination of their motive or state of mind during the bargaining process, and is generally based on circumstantial evidence, since a charged party is unlikely to admit overtly having acted with bad intent. Hence, in determining whether the duty to bargain in good faith has been breached, particularly in the context of a "surface bargaining" allegation, we look to whether the parties' conduct evidences a real desire to reach an agreement—a determination made by examination of the record as a whole, including the course of negotiations as well as contract proposals. As the Administrative Law Judge's findings appear to be bottomed primarily on what he viewed as Respondent's "unacceptable" proposals on management rights, on no-strike, and on grievance/arbitration, it is appropriate to briefly outline the parties' proposals in those areas.[4]

1. Arbitration: The Union's arbitration proposal was basically similar to that contained in the existing production and maintenance (P & M) contract between the parties, except for the deletion of section 10 thereof. That section provided that only properly processed grievances involving an alleged company violation of the agreement would be subject to arbitration, and also specifically excluded from arbitration the establishment of wage rates or changes of job classifications, as well as grievances that would change or exceed any of the terms or conditions of any of the Company's published benefit plans. The Union's last written proposal prior to the strike was the same as its initial proposal on August 2. The Union also sought to eliminate or reduce the 180-day probationary period for new employees, and to provide for arbitration concerning the discharge of probationary employees.

Respondent's initial contract proposal did not include arbitration. Its proposal of December 16 provided for arbitration for settling disputes arising out of the discharge of regular employees. Its January 26 proposal was essentially the same, except that it included disputes arising out of discipline as well as discharge. Unlike the parties' contract for P & M employees and the Union's proposal for clerical employees, Respondent proposed that the decision of the board of arbitration be final and binding upon the parties.

2. No-strike: The Union proposed a relatively weak no-strike clause which, unlike the one in the P & M contract, would permit sympathy strikes and eliminate the Company's right to discharge or otherwise discipline employees for violation of the no-strike clause. Its final proposal, a few days prior to the strike, was substantially the same as its initial proposal in August.[5] Respondent proposed a strong no-strike clause, which included a section imposing responsibility on officers or stewards to encourage employees to return to work in the event of a breach and a provision permitting the Company to request immediate arbitration in the event of violation (with those arbitral expenses to be borne by the Company). Respondent's initial proposal had included a provision permitting the Company to impose discipline for failure to carry out responsibilities under the officer/steward section; subsequent proposals deleted that provision but retained provision for company discipline of employees for breach of the no-strike provision itself.

3. Management rights: The Union's initial proposal did not include any management-rights provision. In response to Respondent's proposal, the Union proffered a weak management-rights clause and, with its final proposal of February 23, would have permitted Respondent such rights as determining the size of the work force, hiring, suspending, disciplining, or discharging for just cause, and assigning employees to jobs subject to any of the other terms of the Union's proposed agreement. Respondent proposed a strong management-rights clause, somewhat more detailed than that in the parties' P & M contract. As with the Union's proposal, Respondent's proposal thereafter remained substantially the same.

4. Wages: The parties initially agreed to postpone consideration of economic matters. The Union's initial wage proposal, on November 7, requested an increase of about 33 percent, with increases based on progression rates in multiples of 2 to 12 months for five different classifications. Wages were to be on an hourly rather than the existing monthly basis, and the merit increase system was to be eliminated. Respondent, on December 8,

[4] These items plus "seniority and the merit" system, were viewed by the Federal mediator working with the parties as the major areas of disagreement. The merit system is interrelated with the subject of wages, and, as the record also shows the latter as a significant area of disagreement, it, too, is discussed *infra*.

[5] Although the Union at one point submitted a no-strike article which omitted the section permitting it to engage in sympathy strikes and precluding disciplinary action, testimony at the hearing indicated that its omission of that section was not intended.

proposed a small wage increase based on its existing merit system. This offer was increased on December 16 to provide an additional lump-sum payment as well as an increase in the merit structure. The Union's January 16 proposal lowered its wage increase demand to approximately 24 percent. The Union also proposed that wage increases be made retroactive to January 1977. Respondent, on January 24, proposed a wage-package increase of approximately 8.2 percent.

Analysis and Conclusion

As noted above, in ascertaining whether the duty to bargain in good faith has been complied with, it must be remembered that Section 8(d) does not "compel either party to agree to a proposal or require the making of a concession . . . ." Thus, the Board does not, "either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements." *N.L.R.B.* v. *American National Insurance Co.*, 343 U.S. 395, 404 (1952).[6] On the other hand, as stated by the Supreme Court," [T]he Board has been afforded flexibility to determine . . . whether a party's conduct at the bargaining table evidences a real desire to come into agreement . . . . And specifically we do not mean to question in any way the Board's powers to determine the latter question, drawing inferences from the conduct of the parties as a whole." *N.L.R.B.* v. *Insurance Agents' International Union, AFL-CIO [Prudential Insurance Co.]*, 361 U.S. 477, 498 (1960). The Board does, of course, with court sanction, consider the content of bargaining proposals as part of its review when making a determination as to the good faith of parties negotiating a contract.[7]

Thus, turning first to the contract proposals herein, we find it clear as set forth above that Respondent desired strong no-strike and management-rights sections, coupled with arbitration limited to matters involving discharge or discipline.[8] Likewise, as found by the Administrative Law Judge, the Union was clearly attempting to "obtain improvements either in language or position that it had not been able to secure in the other two units." Thus, the Union proposed a weaker management-rights provision, while Respondent's management-rights provision was somewhat more detailed as compared with that contained in the parties' P & M contract. The "detail" language, it appears, was taken largely verbatim from another of Respondent's contracts with OCAW. Also, Respondent's proposal that arbitration of grievances be limited to those signed by employees had its counterpart both in the P & M contract and in then-current contracts between Respondent and OCAW at other locations. Although the Union apparently objected to this, we note that its own written proposals utilized language similar to that of the P & M contract.[9] The Union, on its part, sought to eliminate or reduce the probationary period contained in the existing P & M agreement, to add to the arbitral process the discharge of probationary employees, and to eliminate the existing exemption of matters concerning Respondent's nationwide benefit plans.

In response to the Union's initial wage proposal, Respondent asserted that wages for unit employees were already substantially above area figures for comparable jobs, as published by the Department of Labor's Bureau of Labor Statistics. This contention was not refuted. Further, we note that, in addition to other areas of agreement already reached by the parties at the time of the strike, both had proposed almost the same language, albeit in different articles, to wit: that the agreement would constitute the sole and entire agreement, that it expressed all of the obligations and restrictions imposed on each of the parties, that the parties had had unlimited right and opportunity to make demands and proposals, and that their understanding after the exercise of such rights was set forth in their agreement.

Contrary to the Administrative Law Judge, we conclude that the proposals described above indicate hard bargaining by both sides, each desirous of improving its position *vis-a-vis* the other as measured by the existing P & M contract. Thus, in our view, the proposals of Respondent do not warrant a finding of bad faith based upon its having offered them. Nor do we find that they can be fairly characterized as harsh, vindictive, or otherwise unreasonable.[10] Apart from the contract proposals themselves, the conclusion that Respondent met its obligation to bargain in good faith is supported by other factors which we deem relevant in our consideration of the totality of the circumstances revealed by the record. In this regard, we note that the parties have maintained an ongoing bargaining

[6] But see fn. 10, *infra*.

[7] See, e.g., *Seattle-First National Bank* v. *N.L.R.B.*, 638 F.2d 1221, 1225-26 (9th Cir. 1981); *Pease Company* v. *N.L.R.B.*, 666 F.2d 1044 (6th Cir. 1981).

[8] It also proposed that the parties' arbitration be final and binding.

[9] In defense of its proposed limiting grievance and arbitration procedures, Respondent contended, *inter alia*, that it was concerned over the large increase in the number of arbitration proceedings in the P & M unit following the arrival of union representative Bergeron in the area and his involvement with Respondent, as well as the potential expense involved under the two-tiered arbitration procedure and its lack of finality.

[10] While unusually harsh, vindictive, or unreasonable proposals may be deemed so predictably unacceptable as to warrant the evidentiary conclusion that they have been proffered in bad faith (see, e.g., *Pease Company* v. *N.L.R.B.*, *supra* at fn. 4, and cases cited with approval therein), the proposals at issue in this case do not, in and of themselves, warrant such a finding.

relationship concerning Respondent's P & M employees for several years, and that the record discloses no intent by Respondent to undermine that relationship. Likewise, the record as to the actual negotiations reflects no refusal by Respondent to meet and confer, or to provide information. It reflects no adamant refusal by Respondent to make concessions in its bargaining positions, or failure or refusal to provide justification for its bargaining posture. Nor does the record suggest that the parties were at an impasse when the strike was called.

Finally, no other unfair labor practices are involved here, and the record reflects no conduct by Respondent away from the bargaining table which would suggest that its negotiating positions were taken in bad faith.[11]

Accordingly, we shall dismiss the complaint in its entirety.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the complaint herein be, and it hereby is, dismissed in its entirety.

[11] Cf. *Safeway Trails, Inc.*, 233 NLRB 1078 (1977), on remand from the United States Court of Appeals for the District of Columbia Circuit, which had concluded that an 8(a)(5) violation can be made out based on other evidence, "even though overt evidence of that bad faith does not appear at the bargaining table itself."

DECISION

FINDINGS OF FACT

STATEMENT OF THE CASE

WALTER H. MALONEY, JR., Administrative Law Judge: This case came on for hearing before me at New Orleans, Louisiana, upon consolidated unfair labor practice complaints,[1] issued by the Acting Regional Director for Region 15, which alleges that the Respondent Chevron Chemical Company[2] violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act, as amended. More particularly, the consolidated complaint alleges that the Respondent refused to bargain collectively with the International as the collective-bargaining representative of its office clerical employees, that the refusal to bargain prompted an unfair labor practice strike, and that, at the conclusion of the strike, the Respondent refused to grant reinstatement to striking employees who had made unconditional offers to return to work. The Respondent insists that it bargained collectively in good faith with the Union, that the strike which began on February 27, 1978, was called by the Union in order to enforce its contract demands, and that the strikers were economic strikers. Respondent further asserts that it replaced most of the strikers, that it was under no duty at the conclusion of the strike to return strikers to work by discharging replacements, and that it has offered to former strikers any available positions in the bargaining unit and stands ready to do so in the future. Upon these contentions, the issues herein were joined.[3]

I. THE UNFAIR LABOR PRACTICES ALLEGED

Chevron Chemical Company is one of several wholly owned subsidiaries of the Standard Oil Company of California (SOCAL) and is a part of what the Respondent likes to call the SOCAL family. Since 1943, Respondent has operated a plant, known as the Oak Point Plant, on a 70-acre tract of land bordering the Mississippi River at Belle Chasse, Plaquemine Parish, Louisiana, some 15 miles downstream from New Orleans. At the Oak Point Plant, Respondent manufactures chemicals, principally oil additives for industrial users, and ships these items directly to its customers.

In the operation of this plant, Respondent employs just under 200 production and maintenance employees and a handful of laboratory technicians. The production and maintenance employees are represented by the OCAW International and its Local 4-447, pursuant in part to a certification issued by the Board in 1967. The lab technicians are also represented by the same unions following a certification issued in 1968. Contrary to assertions in the Respondent's brief, the International alone was certified by the Board after the 1967 and 1968 elections in these units (Cases 15-RC-3449 and 15-RC-3865), and I take official notice of such facts. However, OCAW Local 4-447 was added as an additional bargaining agent in both units, apparently by agreement of the parties, in order to facilitate the administration of contracts which have been entered into over the years. At the time of the events here in question, contract between the Respondent and the International and Local 4-447 covering these units was in effect, running from February 8, 1977, to February 7, 1979. The matters in litigation in this case are the

[1] The principal docket entries in this case are as follows:

Charge filed in Case 15-CA-6807 by Oil, Chemical, and Atomic Workers International Union No. 4-447 (herein called Local 4-447) against Respondent on March 13, 1978; complaint issued against Respondent in Case 15-CA-6807 on August 8, 1978; charge filed by Local 4-447 against Respondent in Case 15-CA-7014 on August 18, 1978; complaint issued in Case 15-CA-7014, together with order consolidating cases, on September 22, 1978; Respondent's answer filed in Case 15-CA-6807 on August 21, 1978, and in Case 15-CA-7014 on October 2, 1978; hearing held before me in New Orleans, Louisiana, on December 18-20, 1978, and on January 3-5 and 22-25, 1979; and briefs filed with me by the General Counsel and the Respondent on or before April 12, 1979.

[2] Respondent admits, and I find, that it is a Delaware corporation which maintains its principal office in San Francisco, California, and a plant at Belle Chasse, Louisiana. At the Belle Chasse plant it is engaged in the manufacture and shipment of lubricating oil additives, chemicals, and other products. During the preceding year, Respondent shipped from its Belle Chasse, Louisiana, plant directly to points and places outside the State of Louisiana goods and materials valued in excess of $50,000. Accordingly, Respondent is an employer engaged in commerce within the meaning of Sec. 2(2), (6), and (7) of the Act. Oil, Chemical, and Atomic Workers International Union (herein called the International or Union) and Local 4-447 of that International are, respectively, labor organizations within the meaning of Sec. 2(5) of the Act.

[3] Certain errors in the transcript have been noted and corrected.

Both the General Counsel and the Respondent filed post-trial motions to correct the transcript. To the extent the corrections sought in those motions are not addressed in the above-recited corrections [omitted], the motions of both parties are hereby granted.

regrettable result of the inability of these parties to conclude an agreement covering the remaining represented employees at Oak Point; namely, clerical employees who work in the office at that plant.

Following an election held at Oak Point on May 12, 1977, the International was certified as the bargaining agent for the clerical employees. The first negotiating overture was a letter directed to the newly installed plant manager, Paul K. Mulvany, from International Representative James E. Bergeron, requesting information concerning the names, salaries, job classifications, and job descriptions of unit employees, together with a list of benefits currently enjoyed and a current seniority list. With some exceptions, this information was forwarded to Bergeron by Mulvany on June 22, 1977. On August 2, the first of 26 collective-bargaining sessions was held between these parties.[4] Of this number, 22 meetings were held before the beginning of a strike which the Union called on February 27, 1978, and which ended on May 17, 1978. On the union side, the lead negotiator was Bergeron assisted by J. Kelly Lambert, a p & m employee and official of Local 4–447, and a negotiating team of o & t unit members. On the Company side, Mulvany was the chairman of the bargaining committee but much of the negotiating was handled by Frank N. Lockwood, a member of the SOCAL Industrial Relations staff. Lockwood is based at SOCAL's San Francisco headquarters and came to New Orleans for the various sessions. He formulated all of the Respondent's written proposals and counterproposals and attended and spoke at all bargaining sessions.

On August 2, the Union presented an entire contract proposal except for a wage demand. It is fair to say that much, if not most, of the language contained in the Union's proposal was drawn from the existing laboratory-production and maintenance contract, although in some instances it is clear that the Union sought in the clerical contract to obtain improvements either in language or position that it had not been able to secure in the other two units. The unit here in question was composed of 23 individuals, each of whom has a separate job title. Under the Respondent's current salary administration program, except for two switchboard operators, no two clerical employees have the same title. Respondent maintains job descriptions for each of these positions which it ultimately furnished to the Union, although it stated at some point in the proceedings that it felt the descriptions it had furnished were somewhat out of date. In the Respondent's salary administration program, each clerical job title falls into one of six salary classifications and each salary classification keyed to an established salary range.[5] Each salary range, except the 06 level, had an entry level, an acceptable performance level (APL), and a maximum amount. It was the Union's desire to obtain an agreement on job descriptions before bringing forth with a wage demand, since it felt that an agreement on the duties attached to each of the many job titles was a necessary prerequisite to evaluating what each job might be worth in monetary terms.

At the second session on September 14, the Respondent submitted to the Union a series of individual proposals dealing with specific topics, although it did not submit any proposal dealing with cost items, with the sole exception of the right to amend fringe benefit plans during the contract term. Among the items proposed on this occasion by the Respondent was recognition only for the International as a party to the contract and a refusal of any recognition of Local 4–447 as a joint party in the manner of the p & m contract. Respondent also proposed that union officials be permitted to enter the plant only with the prior approval of the plant manager, that the Union be limited to one steward, and that the steward should not be permitted to leave his or her work during working hours. Respondent also proposed a no-strike provision which *inter alia* outlawed sympathy strikes and placed special responsibility upon the union steward to work during any interruption and to encourage employees engaged in a strike to return to work. The proposal further provided for discharge or discipline of violators of the no-strike clause, without union opposition to the Company's selection of employees to be discharged, and would extend this right also to permit the removal of those who encouraged or abetted a violation of the no-strike clause. Respondent's proposal also exempted any punishment exacted for no-strike violations from the scope of the grievance machinery.

The Respondent maintains a booklet outlining in great detail several benefit plans which cover not only the Oak Point plant but also about 38,000 employees, both represented and unrepresented, who are employed throughout the SOCAL corporate system. These benefit plans cover such fringe benefits as hospital and medical care, life insurance and survivor benefits, supplementary life insurance, air travel insurance, leaves of absence, employee stock ownership, insurance for serious job-related accidents, and retirement. On September 14, Respondent proposed to the Union that it be contractually permitted to amend any of the provisions of these plans during the contract term at its option, reserving only the obligation to inform the Union of any changes it might make.

On the subject of hours of work and overtime Respondent proposed to incorporate its present practice of paying overtime after 40 hours in 1 week and 8 hours in 1 workday, and of paying a meal allowance of $2.25 for those who work more than 2 hours of overtime. It sought to prohibit by contract the pyramiding of overtime. However, its proposal did not establish any particular hours of work for clerical employees, leaving the Respondent free to employ them at any hour on any day for any amount of time.[6] Respondent further proposed a

[4] The parties have stipulated that negotiations took place on the following dates: In 1977—August 2; September 14, 15, and 27; October 12 and 13; November 1, 2, 7, 8, and 28; December 8 and 16; in 1978—January 10, 16, 24, 25, and 26; February 1, 22, 23, and 24; March 2, May 16, November 30, and December 1.

[5] As of November 11, 1977, Respondent employed two employees in its highest clerical wage classification (01), six employees as 02, six employees as 03, five employees as 04, and four employees as 05. It does not appear that it actually had any 06 employees on its payroll at the times here in question.

[6] For many years, Respondent's clerical employees have regularly worked an 8-hour day, beginning at 7:30 a.m. and quitting at 4 p.m., with

Continued

180-day probationary period, during which time a probationary employee would have no access to the grievance machinery. In another of the Respondent's proposals, seniority was defined as the total length of an employee's continuous service with the Standard Oil Company of California and its subsidiaries. According to further provisions of this proposal, seniority would apply only in cases of layoff and recall, and then only if, in the Respondent's exclusive judgment, an employee had equal qualifications, experience, past performance, ability, and physical fitness as some other employee who was competing for retention or recall.

On the subject of grievances, the Respondent proposed on September 14 that only an employee could submit a grievance and that a grievance could relate only to the failure of the Company to comply with a specific written provision of the contract. Its proposal to the Union outlined a series of employee (but not Union) appeals going ultimately to the plant manager or his designee, but it contained no provisions of any kind for arbitration by a neutral. Plant Manager Mulvany said it was the Respondent's intention to avoid arbitration in the clerical unit and to preclude the Union from participation in the grievance machinery because the Union (presumably Local 4–447) had harassed the Company with the p & m unit with the grievances which it had filed. The Company's September 14 general proposal contained an assortment of items, including provision for a union bulletin board on plant property but permitting posting thereon only with the approval of the plant manager, non discrimination, no electioneering or conducting of union business on working time and no solicitation of urion memberships during working time. Respondent's management rights proposal was wide ranging and reserved to management such exclusive prerogatives as the determination of starting and quitting times, the number of hours and shifts to be worked, the establishment and elimination of job classifications, the modification or changing of work rules, the assignment of duties to employees and employees to jobs, the right to hire, demote, layoff, recall and transfer employees, and the unlimited right to discharge, discipline, or demote employees. The Union detailed its objections to these offers. None of the above-recited proposals met with union acceptance. The only agreement which was reached on that day related to pay for jury duty, a union proposal which incorporated verbatim the provisions of the p & m contract in that item.

In the session which was held the following day the Union presented a couple of minor proposals dealing with bulletin boards and separability of provisions of a contract. Much of this session was devoted to a company explanation of why it rejected many of the Union's August 2 proposals in its submission of counterproposals on the preceding day. The principal focus of the next few sessions was upon the details of job descriptions. The Union had taken the descriptions furnished to them by Mulvany in June, had circulated them to the affected employees to determine whether, in their view, the Company's descriptions of their existing work assignment was accurate. It then brought employee recommendations for additions and deletions back to the bargaining table for discussion. Each description which was furnished to the Union was discussed in minute detail. For the most part, there was agreement between the parties as to the matters contained in the Union's suggested additions and modifications. The Union's principal objection was leveled at such catchall phrases as "performs other duties as assigned." As noted before, it was the Union's avowed intention of including descriptions as an addendum to the contract or at least coming to some agreement as to job content before proposing monetary ratings for the jobs. The Respondent was opposed to any inclusion of such descriptions in the contract, even if the content of various jobs might be agreed upon as an accurate description of an employee's duties. The reason for the Respondent's position was that such inclusion could limit it in the type of work which it could assign to an employee.

In the September 27 meeting, the Union presented a counterproposal designed to meet the Respondent's objection concerning hours of work. The Union had originally proposed that the contract spell out a 7:30–4 standard workday with an unpaid half hour for lunch. One of the objections of the Respondent was that such specification would prevent it from providing continuous coverage of its switchboard throughout the day and particularly during the lunch hour. The Union then proposed that the workday begin either at 7:30 or 8 a.m. so that one switchboard operator could report half an hour after the normal starting time and work a slightly delayed tour of duty. This proposal was also rejected, with a new explanation that, at a California plant, the Respondent had installed data processing equipment which required occasional work during different hours and that it required such flexibility to meet these needs at Oak Point. Respondent's witnesses admitted at the hearing that it had and has no plan to introduce such a data processing operation at Oak Point.

Much of the time at the September 27 meeting was spent in discussing the union's position that it be allowed to post what it wished on the Union bulletin board and the Company's insistence that nothing be posted without its advance permission. When no agreement was reached, they moved on to a discussion of job descriptions, and specifically the description of the job held by Robert Naquin, the chairman of the inplant committee for the o & t unit. This discussion was conducted largely by Naquin and Sydney Gould, the Company's supervisor of administrative services. After discussing Naquin's job description for about an hour, the Company indicated that it wanted to have particular management personnel present to talk about the nitty-gritty of clerical duties and requested an adjournment until they could be available for that purpose. The next meeting did not take place until October 12.

On October 12, the Union again requested and the Respondent again refused to agree to recognize Local 4–

an unpaid half hour for lunch. The two switchboard operators worked similar tours of duty, except that their hours are adjusted slightly to provide coverage of the switchboard during the lunch hour. Respondent's principal witnesses testified that it has no present plans to revise this office schedule.

447, along with the International, as the bargaining agent. Bergeron explained to management representatives that the International had assigned the Local to be its agent for purposes of representing the clerical unit but his explanation was unavailing. The parties discussed other matters in dispute, such as overtime, safety and health, management rights, seniority and grievances, and various other items, arriving at agreement only on the item dealing with nondiscrimination. The balance of the session was spent going over individual job descriptions. The Union made a proposal that a discharged individual be allowed to see a union representative before leaving the plant. The proposal was rejected. While management representatives frequently agreed to the accuracy of proposed descriptions, Lockwood frequently stated that the Respondent was not necessarily agreeing to the form of the descriptions being proffered or that job descriptions should be a part of the contract. Mulvany asked Bergeron when the Company might expect a wage demand from the Union and Bergeron replied that it would be presented as soon as there was agreement on job descriptions so that the Union could be in a position to rate a job. The discussion of job descriptions continued for two more sessions.

The review of job descriptions concluded at the November 1 meeting, except for one or two descriptions which had yet to be furnished to the Union. This meeting was punctuated by an angry exchange between Mulvany and Bergeron. Mulvany objected to the circulation of a so-called underground plant newspaper which held up to ridicule Charles Brown, a former operations manager. Bergeron said he did not want to hear Mulvany hollering at a negotiating session, to which Mulvany replied that he would do as he damned well pleased. A lengthy recess followed.

With respect to job descriptions, Lockwood told union negotiators when bargaining resumed that the Company in general agreed that the duties outlined in the job descriptions were the duties which various employees performed, but again stated that his agreement did not constitute agreement that job descriptions should be a part of a contract or that the descriptions agreed upon should be the content of the respective jobs. The parties went on to discuss other items, such as health and safety, a separability clause, hours of work, checkoff, and paying union negotiators for time spent in negotiations. During the course of this session, Bergeron accused company negotiators of failing to negotiate with a seriousness of purpose and stated that he felt that no further progress would be made as long as they were meeting in the plant caucus room. He insisted that they meet on netural ground and suggested the office of the Federal Mediation and Conciliation Service (FMSC) in downtown New Orleans. The reply of the Respondent was that, if they met downtown, meetings could not begin before 10 a.m. and would have to conclude about 2:30 or 3 p.m. because "they had a plant to run." From that day forward, all negotiations took place at the FMCS office in New Orleans, although not necessarily in the presence of, or with the assistance of, a Federal mediator.

At the November 2 meeting, the first to be held at the FMCS office, the parties discussed arbitration, leaves of absence, bulletin boards, and the accummulation of seniority during leave. The Union presented a slightly revised bulletin board proposal which was discussed at some length. The proposal called for posting notices of official union business, such as union meetings, union elections, union social events, and union activities and programs without advance company approval, if the notice bore the signature of an authorized union official. The Respondent rejected the proposal, as written, because it did not know what the Union meant by the term "union activities" or what it meant by the expression "shall be posted." Later, at the November 7 meeting, the parties agreed upon a bulletin board proposal containing slightly revised language.

The parties then discussed a union proposal for disaster leave. In the course of the discussion, the Union requested a copy of the Respondent's hurricane procedures and was promised a copy, although it was never forthcoming. No agreement was reached on hurricane leave or leave to participate in a general public practice known as rallying for repairs which takes place from time to time in Plaquemine Parish after heavy storms and innundation by Gulf waters. To the Union's insistence that employees have to have time off to attend to personal property during hurricane watches, such as Hurricane Betsy, Mulvany replied that the Company had adequately provided for these kinds of emergencies so there was no need to write a provision covering them into a collective-bargaining agreement.

The Union asked the Respondent if it had any counterproposals concerning job descriptions or any monetary offers to make. The Respondent said that it did not have any proposals along these lines. The Respondent then questioned Bergeron as to when the Union was going to make an economic proposal. This exchange prompted Bergeron to voice his disapproval of the manner in which the Company went about bargaining and to question whether it was seriously intent upon negotiating a contract.

At the November 7 session, the first discussion of wages and related matters took place. The Respondent submitted to the Union what it called a job description. The document, which is in evidence, does not undertake to describe the duties attached to any proposed or existing job in the bargaining unit. Instead, the proposal lists four pay classifications (01 through 04) and lists the various duties which a person holding that pay classification would be expected to perform. For instance, it says that an 04 employee would be expected to perform routine clerical assignments in one or more of the following functions—accounts payable, production, planning, machine operation, and inventory control, with further itemization under each of these categories. Lockwood said that it was not the Company's intention that anyone paid at a certain level would have to do all of the things listed at that level at any one time. Bergeron asked Lockwood which jobs in the bargaining unit fell into which pay categories under the Company's proposal and pressed the point by asking how an individual employee could tell from the company proposal which of the jobs outlined for a particular pay category was his job. Lock-

wood's reply was that the Company would tell them which work was his. Bergeron asked Lockwood what the Respondent's "job description" proposal would do to jobs that were presently assigned. Lockwood said it would do very little. When asked if the Company intended to change current job assignments, Lockwood replied that the Respondent intended to pay employees for what they are doing but that he knew of no present plans to change job assignments. The Union also objected that the Company's written proposal bore no relation to the lengthy discussion concerning job descriptions, stating that the company proposal was not in fact a job description or set of descriptions and that he did not think that the Company was seriously bargaining when it proffered this document.[7]

Without benefit of any agreement on what duties pertained to which positions in the bargaining unit, the Union presented a wage proposal tied to a classification plan which simply listed existing job titles in the bargaining unit together with the pay levels currently assigned to those titles. This listing was followed by a wage proposal which called for specified hourly rates containing four steps (start, 12 months, 24 months, and 36 months) in each of five pay levels. The parties went on to discuss union objections to the Company's no-strike proposal, its limitation of one steward in the unit, the company request that it be allowed to change its benefit program unilaterally, the question of adding Local 4–447 as a party to the contract, and the company proposal to prohibit union representatives from talking to employees during working hours. No agreement ensued.

On the following day, the Respondent modified its proposal on steward activity by changing proposed restrictions on such activity from working time to working hours. The Union questioned the fact that stewards would be prohibited from engaging in grievance discussion during working hours since this was the period of time when grievances arose led by management. The Union asked to discuss the Union's proposals of benefits and vacations. The Company replied that it was not in a position to respond or to bargain concerning these matters until it had a reasonable opportunity to review the Union's economic package. Bergeron pressed Lockwood as to when this would be and Lockwood's only response was that the Company wanted a reasonable time. He declined to make any commitment as to when the Company would be in a position to discuss these matters.

Name	*Job Title & Classification*	*Amount of Increase*	*Date of Increase*
Duplessis	Accounting Assistant (03)	$81 per mo.	10/1/77
Jenkins	Accounts Payable Clerk (04)	46 per mo.	7/1/77
Belt	Receptionist (05)	37 per mo.	8/22/77
Joseph	Senior Typist (05)	37 per mo.	8/17/77
Knight	Mail/Supply Clerk (05)	37 per mo.	9/22/77

At the November 28 session, Respondent made certain additional proposals concerning contract language but it made no proposal concerning wages or other cost items (aside from the benefit program). The Company submitted a slightly modified general proposal concerning a union bulletin board and engaging in certain specified union activities on company premises during working time, and a proposal on nondiscrimination. The Union agreed to the bulletin board proposal and the nondiscrimination item but did not agree to other portions of the proposed general item. The Company also submitted a proposal concerning the activities of shop stewards. The proposal was similar to a previous company proposal on this subject, except that it permitted the steward to attend to grievance matters, with company permission, during working hours. No agreement was forthcoming on this proposal. The Union's principal objection to the company proposal was that it did not permit a steward to initiate a grievance investigation but permitted such investigations to commence only upon request of an employee. With respect to the benefit plan, the Company advanced a proposal which would commit the Respondent to notify the Union when benefit changes were contemplated, and which restricted the Company not to "lower the general level of benefits existing as of the date of the agreement." Bergeron asked Lockwood who would make the determination as to whether the general level of benefits had been lowered by a partiuclar change. Lockwood said that the Company would make this determination.[8] The Union also objected to an ele-

[7] Bergeron testified as follows as to his conversation with Lockwood concerning the meaning and intent of the Respondent's job description proposal. His account was not materially contradicted.

> All it listed was Level 1 and it listed seven categories—accounts payable, timekeeping, production, inventory control, machine operation, planning, and miscellaneous, and it didn't define any specific job. It didn't define any of the jobs that we had been reviewing during the course of our negotiations or that the company had submitted to us prior to negotiations and it just defined levels of pay. Not of pay but just levels of work. . . . I asked Mr. Lockwood would he explain what jobs would fall in which category and I read through it. . . . I said "looking at Level 1, am I to understand that a Level 1 employee would be required to perform all of the duties of Level 2, 3, and 4." He said, "Yes." I said, "Are you telling me that any 01 has to perform all of the accounts payable, timekeeping, production inventory control, machine operations, planning and miscellaneous of every job below it because the job reads that way? He said, "Well, if you [were] going to Accounts Payable, you would do all of accounts payable at every level," and I said, "How would a person know [he was] in accounts payable?" and he said, "They would be assigned to accounts payable." I said, "Well, would this person be an accounts payable person and his job duties would reflect all of accounts payable?" and he said, "Yes." I said, "Could this person be assigned to any other job in level 1?" and he said, "Yes." I said, "And when assigned would they know," and he said "They would do all of these chores if you were in timekeeping. You would do all the timekeeping functions or are subject to it" . . . and the same thing would apply to all the jobs, whatever job was on that level, you would know that job and all the ones below it, as indicated on that sheet, so how would a person know what his job consisted of and he said, "We assign them and tell them," but the document did not reflect any of the discussions that we had on job descriptions. This was no definition of jobs as we see it and we objected to that.

[8] When he was on the stand, Lockwood was questioned by me concerning what was meant by the phrase "general level of benefits." Lockwood first replied that the phrase meant the cost to the Company of any particular item. Later he changed his testimony to assert that general

Continued

ment of the Company's proposal which would reserve to the Company the exclusive right to establish service dates for the measurement of certain provisions in the benefit plan which are based upon longevity. The parties then went on to discuss certain elements of the Company's vacation pay proposal. Certain language relating to vacations was agreed upon but the Company said that it was not in a position to propose or agree to the number of paid holidays to be observed, presumably because this was a cost item.

The Company presented a slightly modified no-strike proposal, deleting certain language which the Union found objectionable in an earlier proposal. The Union still objected to the provision making those who "aid and abet" a no-strike clause violation subject to discharge, claiming that the language was vague and could be used to harass people who were not striking. However, the essence of the Union's objection to the no-strike clause was tied to the unwillingness of the Respondent to agree to arbitration which was as broad as the Union's no-strike commitment. In its September 14 proposal, which was, as of November 28, the latest company position on the subject of arbitration, the Respondent had refused to agree to any arbitration. It later modified this position to agree to arbitration for matters of discipline and discharge but not for violations of contract provisions. At the conclusion of this session, the parties agreed to a separability clause for the contract.

On December 8, the Respondent made its first economic proposals. It also proposed a specific number of paid holidays, namely, the holidays which were currently being observed. Respondent then proposed for the top four classifications a merit salary range with three levels—entry, acceptable level of performance (APL), and maximum. For the lower grades, it contained progression steps based essentially on time in grade. However, the salary plan was not accompanied by a classification plan, so there was no way to tell from the Company proposal which jobs in the bargaining unit fell into which salary ranges. Presumably the salary plan was tied to the wage level proposal which was presented at an earlier session. However, the terms of the December 8 proposal, entitled "*Salary rates and classifications*," did not make reference to it. The Union rejected the company proposal because it said that it did not wish to retain any elements of the merit system and the Company rejected the Union's earlier proposal that wages be computed on an hourly basis.

The parties did agree upon one clause in the Company's vacation proposal, namely, the number of weeks of vacation to be given to employees in various service categories. The proposal in question was essentially the same as the length of vacation for service classifications that may be found in the p & m contract and in the past practice of the parties in this unit. However, the parties were unable to agree that a 2-week vacation meant 14 consecutive days or that 3 weeks meant 21 consecutive days, as specified in the p & m contract. Respondent told Kelly Lambert, who was the Union's chief negotiator for this session, that the Company wished to retain the right to split vacations into something less than a full week at a time. The parties also discussed no-strike proposals. Lambert told company negotiators that the Union could not give up the right to strike unless it could take to arbitration company violations of all contract terms.

The December 16 session was largely inconclusive. The parties agreed on the number of paid holidays to be observed and upon minor clauses in the union representative and leave-of-absence sections, but spent most of their time discussing matters over which there was manifestly no agreement. At this meeting, the Respondent proposed for the first time to allow grievances relating to discharge and discipline to go to arbitration. It also proposed a no-strike clause that would permit the Respondent, but not the Union, to go to immediate arbitration within 48 hours over any discharge effectuated for alleged violations of the no-strike clause. The proposal also provided for procedural waivers which would permit an on-the-spot decision by an arbitrator. The Union voiced its previous objection to any limited arbitration provision which was coupled with broad no-strike clause proposal, saying that such a proposal, taken in tandem with the grievance and arbitration proposals, would not permit it to police the contract.

The Company reoffered its December 8 merit range proposal with an additional sweetener, namely, a provision calling for a lump sum bonus for all employees in the unit on the payroll on the date following the day of the agreement in the amount of 4 percent of their base salary. The Union replied that it opposed the merit system because it had been applied in a discriminatory manner in the past and because the rates set forth in the company proposal would result in raises for only a very few members of the bargaining unit.

The Union stated, in rejecting the no-strike-immediate-arbitration provision, that it amounted to a step backward in negotiations and that the Company was not bargaining in good faith by presenting such a proposal. It also voiced disagreement with a seniority proposal which defined seniority as the length of service with any company in the SOCAL corporate system and which limited the application of seniority to cases of layoffs and rehirings and only when, in the exclusive judgment of the Company, other enumerated factors were equal.

After the Christmas holidays, the parties met again on January 10 but little was accomplished. After a recap of the various positions of the parties, Mediator Demcheck analyzed the situation to be that the parties were apart on management rights, strike and lockout provisions, grievance and arbitration, seniority, the merit system, and wages. In short, they were far apart on many if not most basic issues.

On January 16, the Union came to the bargaining table with a substantially modified wage offer. It felt the basic area of comparison for wages was what was being paid in the industry throughout the United States, while the Respondent argued that the proper yardstick to apply consisted of going rates in the Metropolitan New Orleans area. Respondent stated that it had a Bureau of Labor Statistics (BLS) area survey which substantiated its posi-

level of benefits meant the value of benefits which the Company was obligated to pay to an employee, irrespective of the cost of the Company's contribution.

tion on wages. The Union continued to propose a time progression system, containing a starting hourly rate in each of the six wage classifications, with increases on the next three anniversary dates. During this session, the Respondent proposed to implement in the o & t unit a systemwide increase in medical benefits which amounted to a $4 increase its contribution to individual medical coverage and a $10 increase in family coverage. The Union agreed to this increase at the following session.

The Union submitted a management's rights proposal and a revised safety and health proposal. Its original safety and health proposal called for a representative from the o & t unit to become a member of the existing p & m safety and health committee. When the Respondent objected to this proposal, the Union countered with a suggestion that a separate safety and health committee be established just for the o & t unit. The revised proposal also found disfavor with company negotiators and was rejected at the next meeting.

On January 24, the parties conducted their 16th negotiating session. The parties began this session by discussing both the union and company no-strike no-lockout proposals and the question of grievances and arbitration. Mulvany said he was not going to give the Union the right to file girevances because they had been filing too many, presumably in the p & m unit. He added that the Company simply could not handle the volume of grievances it might anticipate in the clerical unit if the Union were permitted to file. The Union's response to Mulvany was that many grievances were being filed in the p & m unit because there were many contract violations on the part of the Respondent. This exchange led nowhere in terms of a contract agreement.

The major item put forth at this meeting was a revised company wage proposal. It incorporated many of the features of previous company proposals relating to merit ranges and a lump sum bonus, but it also proposed specific individual rates for each of the 23 named members of the bargaining unit. These new individual rates would mean that, on the average, the members of bargaining unit would receive raises averaging slightly more than 4 percent over their current regular earnings. Increases in excess of the stated amount would then depend upon an employee's evaluation by his supervisor under the merit system. The Union rejected any proposal confering upon the Respondent the right to raise wages under a merit system, claiming that the implementation of this system had been abused and that such abuses would not, under the company proposal, be subject to any grievance and arbitration machinery. A further objection was voiced, namely, that a promotion from one pay level to another pay level might result in a cut in pay since an employee might be making, under the merit system, more in a lower pay level than the entry level at the next higher step. Lockwood's reply was that this would never happen because the Company did not promote people in order to pay them less. The Company charged that a breakdown in bargaining had occurred because the Union would not agree to the merit pay system which was proposed. Lambert's reply was that the Union was not interested in a sweetheart contract. The Respondent also rejected a union proposal setting hours of work, saying that it needed the flexibility to start office employees at any hour and citing again a three-shift computer operation at one of its California plants as an example of the operating necessity which supported its position.

Toward the end of the meeting, Bergeron asked Lockwood what the Company had in mind concerning the duration of any proposed contract. Lockwood said that the Company had nothing definite in mind but that it normally negotiated 2-year agreements. Bergeron noted that the Company's wage proposal did not call for any specified increases during the contract term and inquired whether the Company was suggesting a wage increase for a 1-year term. Lockwood said that company negotiators would sleep on this question and get back to the Union.

On the next day, the Respondent proposed a 2-year agreement with a wage reopener at the end of the first year. However, the no-strike provision and the limitations on the scope of grievances and arbitration would prohibit the Union from applying economic force or resorting to any contract machinery to enforce any wage demand it might make during the wage reopener. After this proposal was made, Bergeron replied that he felt that calling upon the Union to agree to a wage reopener that it could not enforce by strike action was an insult to the Union. He informed the Company that the Union would not agree to a 2-year proposal which either did not have an increase for the second year or a strikeable reopener at the end of the first year. This meeting lasted only about 40 minutes and concluded shortly before noon.

The parties met again on January 26. At this meeting, Mulvany presented the Union with a complete contract proposal which it was willing to sign. The parties went through the company proposal item by item. The contract package advanced by the Company contained no matters not previously discussed except that the Company did agree for the first time to include discipline of employees as an arbitrable matter and also agreed to incorporate into the contract its current practice of paying transportation home for clerical employees who were called upon to work overtime. The discussion on both sides, contained in detail in the record, merely reiterated previous arguments and objections which had been voiced before when these items had been discussed as separate proposals.

The parties met again on February 1 and met separately with a Federal mediator on February 22, but to no avail. During the afternoon session at the FMCS office on February 22, Bergeron told Mulvany that he did not appreciate the manner in which Mulvany had talked to Naquin in a discussion which had taken place at the plant. A few days earlier, Mulvany had called Naquin into his office and complained to Naquin about the tenor of certain language on a leaflet which had appeared at the plant. The leaflet urged a strike and made some disparaging references to Mulvany. According to the information presented to Bergeron, Naquin agreed with Mulvany that the language in question was out of line but disclaimed any union responsibility for it, whereupon

Mulvany reportedly threw Naquin out of his office. When Bergeron attempted to bring this to the attention of company negotiators, Lockwood promptly advised Mulvany not to answer any questions and said, "Let's get out of here. If they want, they can talk to us at the plant." Bergeron said he would not talk to them about this matter at the plant because Mulvany did not want Naquin in his office, whereupon the company negotiators got up and left. As they were leaving the room, Bergeron said he would not have the Union's group chairman spoken to as Mulvany had spoken to Naquin.

On February 23, the Union presented an entire contract proposal containing its previous individual demands, providing for retroactivity of the proposed wage increase and an expiration date of February 7, 1979. The proposal also provided for shift starting and ending times and shift differentials for afternoon and late evening shifts. After reviewing the Union's package, the Respondent said that it would have an answer the following day.

On February 24, the Respondent's answer was that it was willing to sign the package it presented to the Union on January 26 but viewed the Union's proposal as a step backward because of the shift differential proposal. Respondent objected to the shift differential and claimed it to be an introduction of a new demand in bargaining. The Union answered by saying that the shift differential was introduced only to accommodate the Respondent's earlier objection to the Union's first hours-of-work proposal, namely, that it needed flexibility to direct clerical employees to come to work at other than normal starting hours. The latest union proposal permitted shift work but attached to that concession the requirement for a shift differential. They again discussed the question of a possible reduction in pay after a promotion because minimum entry rates in higher classifications were sometimes lower than the higher ranges of the lower classifications. Lockwood reiterated his previous position that such an eventuality would not happen. They also discussed the proposal for a relief rate for employees temporarily assigned to positions in a higher classification than the one they held. Bergeron asked Lockwood how a determination would be made that an employee was in fact working in a higher classification for a substantial period of time. Lockwood replied that the Company would make that determination. They also discussed the lump sum or bonus provision in the Company's proposal and to what extent, if any, it would be retroactive.

At the conclusion of the formal negotiating session, Mediator Demcheck met privately with Lockwood and Bergeron. During this meeting, Bergeron reiterated that the Union had to have an effective means of policing the contract. Either it had to have the right to strike over contract violations or it would have to have an agreement to arbitrate grievances by a neutral with respect to any contract violation. The Respondent refused to agree to general arbitration. Lockwood said that the Company was insistent upon retaining a merit pay system and asked the Union if it had any counterproposals to the Company's last wage offer. Bergeron stated that the Union was working on a proposal which included a merit aspect to it but he doubted that he could have it ready that evening. Lockwood then suggested that he have it ready by the time the next meeting took place and suggested March 2 as a date for their next meeting. Bergeron stated he was agreeable to meeting on March 2 but informed Lockwood that he could not guarantee that work stoppage would not take place in the interim. Lockwood, whose office is in San Francisco, replied that he had a plane to catch. This was the last meeting of the parties before the strike. As of this time the parties had reached agreement only on holiday pay, vacations, bulletin boards, jury duty, increases in the medical plan, and actual language on certain minor matters.

In the late afternoon of February 26, bargaining unit members met at the OCAW Hall in Marrero, Louisiana. Of the 23 members, 15 attended. The meeting was chaired by Naquin. Naquin brought to the attention of the membership the company proposal of January 26. He told the assemblage of the lack of progress in negotiations and questioned the seriousness of the Company in trying to reach an agreement. He went through the company and union proposals item by item and outlined the positions of the parties on particular items. One of the members inquired whether unfair labor practice charges were going to be filed against the Company. Bergeron, who was present at the meeting, replied that the matter was being discussed with the Union's attorney. An inquiry was made as to the position of the negotiating committee. Naquin replied that his own personal feeling was that the Company was not bargaining in good faith and that the membership had no recourse but to strike. Other members of the committee expressed the same opinions. A strike vote was taken by secret ballot and carried by a vote of 14 to 1.

The strike began on February 27 and was supported by 15 of the 23 members of the unit. Pickets began to patrol the two principal plant gates. Additional negotiation sessions took place on March 2 and May 16 but they were inconclusive. During this period of time, the Respondent began to hire replacements. On May 17, the Union terminated the strike and withdrew its pickets. Both the Union and the strikers tendered written offers to return to work. Shortly after the tender, Mulvany informed the Union that all but one position in the bargaining unit had been filled by permanent replacements. He offered a job to former striker Capdeville and Capdeville accepted. In mid-June, the Respondent offered another job to former striker Perez and Perez accepted. At the time of the hearing, some 13 strikers had not returned. No issue was raised either to the bona fide nature of the replacements or to the fact that the offers to return, which were made by strikers on May 17, were unconditional.

Following the cessation of the strike, negotiation sessions took place on November 30 and December 1, 1978, but outstanding issues between the parties were not resolved. At the November 30 session, the Respondent modified its previous positions in that it would agree to recognize two stewards rather than one, would agree to the Union's vacation selection language, would grant to the Union as well as to employees the right to initiate grievances, would grant greater rights to union repre-

sentatives to access to the plant, and would accord to a discharged employee the right to consult a union representative before leaving the plant. These further concessions did not result in a contract.

II. ANALYSIS AND CONCLUSIONS

A. *General Considerations*

Section 8(d) of the Act requires both employers and labor organizations, when they engage in collective bargaining, "to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession." It has often been said that the fact that an employer meets and confers with a labor organization without accepting any or all of the demands made upon it does not, in and of itself, indicate a lack of good faith on its part. The converse of the proposition is equally true. The fact that any employer meets with a labor organization and grants certain concessions in the course of negotiations does not, in and of itself, establish the existence of good faith. As the Fifth Circuit put it in *Herman Sausage*:[9]

> In approaching it from this vantage, one must recognize as well that bad faith is prohibited though done with sophistication and finesse. Consequently, to sit at a bargaining table, or to sit almost forever, or to make concessions here and there, could be the very means by which to conceal a purposeful strategy to make bargaining futile or fail. Hence, we have said in more colorful language it takes more than mere "surface bargaining," or "shadowboxing to a draw," or "giving the Union a runaround while purporting to be meeting with the Union for purpose of collective bargaining."

According to the General Counsel's theory of this case, the Respondent is not charged with any *per se* violations of Section 8(a)(5) of the Act, although, as discussed later, at least two such violations clearly appear from the evidence contained in a lengthy and ponderous record.[10] The General Counsel argues that the Respondent was guilty of "surface bargaining," a term first coined by the Fifth Circuit in the *Whittier Mills* [11] case to describe the lack of overall subjective good faith in carrying out a bargaining obligation. The requirement good faith in bargaining has been said to demand "an open and fair mind, and a sincere purpose to find agreement."[12] Parties are "required to do something more than attend purely formal meetings constituting no more than a mere pretense at negotiations."[13] Of necessity, the standard of good faith in collective bargaining can have meaning only in its application to the particular facts of a particular case.[14] While the Board has often been reminded that it has no authority to pass judgment upon the adequacy or the propriety of an offer or concession, the Board is not precluded from examining the substantive proposals advanced by the parties in order to determine the existence *vel non* of good faith in a collective-bargaining effort.[15]

While the requirement of good faith is perforce an elastic standard, there have emerged over the years, in the many cases in which this standard has been litigated, certain recurring fact patterns and statements of principle which provide more precise guidelines. One clear indicia of bad faith on the part of an employer is the exercise of proposing to a union an offer or set of offers which are predictably unacceptable and adhering rigidly to such proposals. *Sweeney & Company, Inc.* v. *N.L.R.B.*, 437 F.2d 1127, 1135 (5th Cir. 1971). A contract proposal or set of proposals which would leave a union and its membership worse off than they would be if they continued to work without a contract is generally deemed to be a rejection of the collective-bargaining principle and solid evidence of bad faith. *Romo Paper Products Co.*, 220 NLRB 519 (1975). The use of delaying tactics is an aspect of bad faith in the bargaining process, *A. H. Belo Corporation (WFAA-TV)* v. *N.L.R.B.*, 411 F.2d 959 (5th Cir. 1969), as is the granting of wage increases to bargaining unit members during the course of negotiations without first notifying the Union and bargaining with it concerning the increases. *A. H. Belo Corporation* v. *N.L.R.B., supra; N.L.R.B.* v. *May Aluminum, Inc.*, 398 F.2d 47 (5th Cir. 1968).

A lead case in the area of surface bargaining is *"M" System, Inc.*, 129 NLRB 527 (1960), in which, in the course of a long stretch of fruitless bargaining, management rigidly insisted upon a broad no-strike clause, a broad management rights clause, and unilateral authority to grant wage increases, promote, discipline, and discharge employees, and make changes in work rules. The Board held that adamant insistence on this combination of proposals was antithetical to good-faith bargaining, because it would leave the union worse off than it would be without a contract by permitting unilateral action by an employer in areas which are normally the subject of collective bargaining without giving the union anything in return therefor. The Board reasoned that, without a contract, a union could at least strike at any time either to enforce demands or to protest company actions, but with a contract, as envisioned by such employer proposals, it would be shorn of this power while the employer could act unilaterally in vast areas of labor relations without fear of a job action.

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[9] *N.L.R.B.* v. *Herman Sausage Company, Inc.*, 275 F.2d 229, 232 (1960).

[10] It is well settled that the Board has the right to make findings of violations which were fully litigated at the hearing, even though the precise violations were not alleged in the complaint. *Engineers & Fabricators, Inc.* v. *N.L.R.B.*, 376 F.2d 482 (5th Cir. 1967); *N.L.R.B.* v. *Sunnyland Packing Co.*, 557 F.2d 1157 (5th Cir. 1977).

[11] *N.L.R.B.* v. *Whittier Mills Co.*, 111 F.2d 474, 478 (5th Cir. 1940).

[12] *N.L.R.B.* v. *Globe Cotton Mills*, 103 F.2d 91, 94 (5th Cir. 1939).

[13] *N.L.R.B.* v. *Pine Manor Nursing Home, Inc.*, 578 F.2d 575, 576 (5th Cir. 1978).

[14] *N.L.R.B.* v. *American National Insurance Company*, 343 U.S. 395 (1952).

[15] *N.L.R.B.* v. *Strauss and Son, Inc.*, 536 F.2d 60 (5th Cir. 1976).

Variations of this theme, with similar or only slightly differing fact patterns, have appeared in many subsequent Board cases and have been the basis for a finding that an employer was guilty of bad-faith bargaining. *Kayser-Roth Hosiery Company, Inc.*, 179 NLRB 999 (1969); *I.T.T. Henze Valve Service, Controls and Instruments Division*, 166 NLRB 592 (1967); *East Texas Steel Castings Company, Inc.*, 154 NLRB 1080 (1965); *Betra Manufacturing Company*, 233 NLRB 1126 (1977); *San Isabel Electric Services Inc.*, 225 NLRB 1073 (1976) (1977); *Florida Machine & Foundry Company*, 174 NLRB 1156 (1969), and 190 NLRB 563 (1971); *Stuart Radiator Core Manufacturing Co.*, 173 NLRB 125 (1968); *Electri-Flex Company*, 238 NLRB 713 (1978). An assessment of bad faith in bargaining, based upon rigid management efforts to retain final unilateral control by contract over periodic wage increases, employee qualifications, work rules, discipline, working hours, and related terms and conditions of employment, was made by the Fifth Circuit in *N.L.R.B.* v. *Johnson Manufacturing Company of Lubbock*, 458 F.2d 453 (5th Cir. 1972).

In examining the factors which go to make up a finding of bad faith, the whole may be greater than the sum of its parts. In a concurring opinion in *N.L.R.B.* v. *Insurance Agents International Union, AFL-CIO*, 361 U.S. 477, 505-506 (1960), Mr. Justice Frankfurter stated:

> . . . the significance of conduct, itself apparently innocent and evidently insufficient to sustain a finding of an unfair labor practice, "may be altered by imponderable subleties at work . . . ." Activities in isolation may be wholly innocent, lawful and "protected" by the Act, but that ought not to bar the Board from finding, if the record justifies it, that the isolated parts "are bound together as parts of a single plan [to frustrate agreement]. The plan may make the parts unlawful."

Indeed it would be an infringement upon the *Universal Camera* rule[16] to pick apart a series of negotiating sessions and view every component in isolation to determine whether good faith or bad faith was present in each element considered separately. Accordingly, the Board looks to the totality of the conduct of the parties to determine whether they have fulfilled their obligation to bargain in good faith. *Weather Tee Corporation*, 238 NLRB 1535 (1978)

B. *The Respondent's September 14 Proposals*

The set of proposals given to the Union by Respondent's negotiators on September 14 excluded from participation in contract negotiation the OCAW Local which was established to deal with the Respondent regularly over a period of 10 years in contract negotiations and administration of the p & m contract on the basis that, in the o & t unit (as in the p & m unit), the International but not the local was the entity certified by the Board.[17] Respondent sought to exclude from the plant the proper bargaining representative, however designated, unless in each instance he came to the plant and permission was sought and obtained to enter the premises, although the same individual had a contract right, enforceable under the grievance machinery, to enter the same plant premises during daylight hours for contract administration in the p & m unit. Respondent sought all-embracing no-strike protection, even to the punishment of persons who aided and abetted strikers but who did not personally engage in strike action during the contract term. It sought the right to increase or reduce at will all medical, hospital, pension, stock option, and other benefits contained in its companywide benefit plan. It sought complete authority to assign starting and quitting times at will, even though it had followed a uniform and long-standing practice of observing a regular 7:30 a.m. to 4 p.m. workday in its office operation. It sought a definition of seniority which would confer whatever seniority rights which might exist in this bargaining unit upon any employee employed any where in the SOCAL corporate system,[18] sought to restrict seniority to layoff and recall situations, and sought the unchallengeable right to determine when and whether in a layoff or recall situation seniority might be applied. It sought the unlimited and unchallengeable right to promote and demote employees and to exclude the Union from meaningful participation in the grievance machinery, either through the initiation of grievances or assistance to employee grievants who were pressing their grievances during working hours, and it offered nothing concerning the resolution of grievances by arbitration by a neutral. It also sought complete control over the use of union bulletin boards by the Union and offered an all-encompassing management rights proposal.

In short, the Respondent was asking the Union to cease functioning as a bargaining agent in this unit and, in effect, to disappear from the bargaining unit during the contract term. It sought the contract right to determine almost every aspect of wages, hours, and working conditions as well as an assurance by the Union that it would not interfere with the effectuation of its determinations by striking during the contract term. The net effect of Company proposals was that the Union was also asked to give up a statutory right under the *Weingarten*[19] case to represent employees at disciplinary inter-

[16] *Universal Camera Corporation* v. *N.L.R.B.*, 340 U.S. 474 (1951).

[17] In *N.L.R.B.* v. *Wooster Division of Borg-Warner*, 356 U.S. 342 (1958), the Supreme Court said that the substitution of an uncertified local for a certified international was a lawful but nonmandatory subject of bargaining. A party may request such a substitution but it may not insist to impasse on it. In this case, the International designated Local 4-447 as its agent to assist in the administration of the o & t contract, as it did in the p & m unit. Lockwood was asked why the Respondent objected to the addition of Local 4-447 as a party, especially in light of a later company proposal designating the treasurer of Local 4-447 as the recipient of dues that might be checked off. Lockwood replied that it really did not make any difference to the Respondent whether the Local was or was not a party. Assuming, without deciding, that *Borg-Warner* applies to the Union's demand in this case, the fact that the Respondent would seize upon a minor element in negotiations which really did not mean anything substantively to it to refuse an overall agreement is clearly the expression of a mind set bent on keeping a contract from coming into existence. There is nothing about bad faith which requires it to manifest itself only in reference to mandatory subjects of bargaining.

[18] There are about 125 clerical employees working elsewhere in Louisiana for various components of the SOCAL family. Lockwood said he was trying to keep the door open for hiring some of these people at Oak Point in the event of layoffs in their offices.

[19] *N.L.R.B.* v. *J. Weingarten, Inc.*, 420 U.S. 251 (1975).

views. In short, Respondent was seeking everything and offering little. The Union would be better off without a contract at all than to have agreed to the proposals advanced by the Company on this date because it would at least have preserved its statutory right to strike. Under cited Board and court cases, such offers amount to a rejection of the collective-bargaining principle and a clear indication that the Respondent was playing games at the bargaining table. The proposals were predictably unacceptable. The fact that the Respondent modified a few of them during the next 20 bargaining sessions says nothing about the lack of good faith which it demonstrated on September 14 and in no way served to cure the bad faith it manifested at that time. *Federal Mogul Corporation*, 212 NLRB 950 (1974). The best that could be said for the Respondent's action on September 14 in submitting this set of proposals is that it was pursuing a strategy of simply marking time. Such a strategy is also a solid indicator of a frivilous purpose.

C. *Wasting Time*

There is no way to classify or catalogue all of the ways in which a dilentante negotiator can waste time and there is no point in doing so, since calculated delay, however accomplished, is an aspect of bad-faith bargaining. When the Union insisted on meeting on neutral ground after it appeared that several meetings at the plant were going nowhere, the Respondent's reply was that it would have to come late and leave early because it had a plant to run. On several occasions, Respondent's negotiators did not show up at the FMCS office for scheduled negotiations until considerably after the agreed-upon starting time. The Union was certified in May and bargaining began in early August. However, the Respondent did not have a wage offer to present until December 8. Its standard excuse was that it was waiting for the Union to make an offer first. However, after the Union made a wage offer, the Respondent did not make a counteroffer or any other response for more than a month. If this were national bargaining involving a multitude of bargaining units, many thousands of employees and hundreds of job classifications, there might be a shadow of an excuse for such a delay, but we are dealing here with a small unit of 23 clerical employees who were already covered by a well-developed and highly structured salary program which the Union sought to incorporate in large measure into the body of a contract. The Union's demands mirrored the classification and salary plan which had been in effect in the o & t unit for many years, albeit with higher rates than those in existence. The Company's response was not only a disagreement over the amounts of an increase—something which is commonplace and to be expected in collective bargaining—but included an attempt to avoid a contractual commitment even on the bases of its own existing classification plan. Not only was the Respondent unwilling to commit itself to an agreement as to the elements of individual job descriptions,[20] nowhere in its salary proposals was there a willingness even to stipulate that existing job titles, even when unaccompanied by detailed descriptions, should fall into existing salary classifications; i.e., that a head accounting assistant is an 01 or that an engineering clerk is an 03. Yet many tedious and painstaking sessions took place which were aimed at arriving at some agreement over job content so that wage offers from either side would have some meaning. In a few instances, the Respondent dallied many months in submitting requested job classifications. Gould's excuse on one occasion was that he had been carrying the description around with him, had just forgotten to give it to the Union, and wished that the Union had just asked him again for it. In short, the Union's delay in presenting an intelligent wage demand, which was the Company's excuse for not coming forth with an economic package of its own, is directly attributable to the Respondent's frivilousness of purpose in consuming many weeks discussing job classifications which would have no meaning even if agreement were reached on those classifications.

On February 24, at a critical juncture in negotiations, when strike threats were in the air and the Union was working on a salary demand which would attempt to accommodate the Respondent's insistence on its merit system, Lockwood told the Union to wait until a scheduled March 2 session to present the proposal if it could not come back immediately with its offer. When Bergeron replied that he could not guarantee that a strike would not take place in the interim, Lockwood's only response was that he had a plane to catch. Presumably he caught it.[21] This is the kind of dallying and fooling around which is the hallmark of bad faith and the purposeful avoidance of contractual commitments. Lockwood's cavalier attitude toward a strike threat suggests clearly that he welcomed a strike and that such a job action by the Union was what he had been hoping for all along, so that the Respondent could proceed to do what

[20] The Respondent objected to a contractual agreement that existing jobs had attached to them existing duties, on the basis that such a commitment would prohibit it from assigning other duties to the incumbent in that position. This contention is nonsense. Both Respondent's management's rights proposal and the Union's proposal would permit work assignments outside a job description. The difference is that, under the Union's proposal, whenever the Respondent might seek to get more from an employee than it bargained for, it would have to pay more. By its unwillingness to commit itself that any specified wage was appropriate to a particular job content, Respondent was attempting to create a situation in which it could effectively raise or lower compensation simply by keeping the salary of an individual at the same rate but adjusting what he was being paid to do. Respondent's rigid insistence in reserving to itself during the contract term the setting of wages of its employees is, in conjunction with other aspects of its bargaining position, an indication of its unwillingness to negotiate a contractual commitment on the subject of wages.

[21] Lockwood's assessment of his own role in the Respondent's bargaining team and Mulvany's description are not entirely consistent. Lockwood formulated all company proposals and counterproposals and attended every meeting. As plant manager, Mulvany was technically the head of the Company's bargaining team while Lockwood acted in an advisory capacity. Lockwood said that Mulvany was empowed to enter an agreement, even over the objection of the SOCAL Labor Relations Section in San Francisco. Mulvany said his authority was broad but not unlimited. With respect to local issues, he had the last word but with respect to cost items, he could not act beyond the perimeter of authority given to him by his superiors in San Francisco. Plainly, Lockwood was an indispensable party to any final agreement and his absence from the New Orleans area at this key moment meant that no agreement heading off a strike could be arrived at, regardless of what 11th-hour concessions might be made by the Union.

in fact it did do after the strike commenced; namely, clean house.

D. *The Need for Flexibility*

Respondent used a common justification in discussing various contract proposals designed to reserve to it complete power to do as it wished in establishing various aspects of wages, hours, and terms and conditions of employment during the contract term. It needed flexibility. As used in the context of this case and of the events which occurred herein, the term "flexibility" means and can mean nothing other than "power." When the Respondent said that it needed the "flexibility" to set office hours, to grant merit wage increases, or to make work rules unilaterally, it was simply employing a euphemism. What it was really saying is that it wished to retain the power to do these things because it wished to retain the power to do them. Its justification was merely a circular expression or description of its intial position, not an explanation or rationalization thereof. Many of the Union's proposals for the o & t employees were drawn from agreements it had already concluded with the Respondent in the production unit, a much larger round-the-clock operation whose members were engaged in the actual production of oil additives and other chemicals. There is no evidence herein that union proposals, designed to extend to the office staff contractual undertakings which had become standard practice in the operating unit, had unduly inhibited the Respondent's basic operation. Flexibility, however defined, is of far greater importance in an operating unit than in a clerical unit, which exists simply to process the paperwork generated by a production activity. Many of the matters which the Union sought to include in the contract were actual and longstanding practices in the o & t unit itself as well as in the p & m unit. In repeating the catchword "flexibility," both at the bargaining sessions and at the hearing in this case, the Respondent failed utterly to give any meaningful content to the word as applied to its bargaining positions. More particularly, it failed to explain why certain practices afforded it sufficient flexibility to operate the production end of its plant but would unduly restrict it in the conduct of its office operations. It has long been held that good-faith bargaining requires honest claims and that fake or transparently meaningless explanations of bargaining positions are expressions of bad faith. *N.L.R.B.* v. *Truitt Mfg. Co.*, 351 U.S. 149 (1956); *United Steelworkers of America, AFL–CIO* v. *N.L.R.B.*, 390 F.2d 846, 852 (D.C. Cir. 1967). The Respondent's claimed need for flexibility as an objection to so many union proposals was simply not an honest claim. Several examples appear in the record.

Respondent's office staff has long worked a 7:30–4 workday. The Union sought a provision establishing these hours by contract. Respondent said that such a provision would deprive it of needed flexibility in that switchboard operators must have a half-hour overlap to insure coverage of the switchboard during the lunch hour. Faced with this claim, the Union presented a revised demand which would permit a switchboard operator to report at a later hour and thus be available for work during the regular lunch hour. Upon receipt of this revised demand, the Respondent then said that the proposal was insufficient because it might possibly wish to install a computer operation, as it did in a California plant, and such an operation would require shift work. The Union then countered with a further provision permitting shift work but calling for shift differential in pay, a proposal found in other contracts entered into by the Respondent and in accord with its operating manual. At this point, the Respondent pointed the finger accusingly at the Union, urging that the Union was moving backward in negotiations by introducing a new demand in its latest offer on hours of work. In fact, the Respondent has no computer operation in the Oak Point office and admits that it has no plans to introduce such an operation. Its explanation on this point was simply falsehood and its bargaining posture was simply an effort to introduce an obstacle to an overall agreement.

On the question of vacations, the Respondent objected to a union proposal permitting employees to take up to 5 days of their vacation on a 1-day-at-a-time basis. The SOCAL Regulating Manual, which establishes company personnel practices throughout the SOCAL corporate system, permits this practice, subject to the discretion of the plant manager. There is evidence in the record to establish that this practice was permitted and followed at Oak Point. However, Mulvany stated that it would cause an administrative headache and thus vetoed any company agreement on the point. The Union also proposed that vacations be scheduled for a full week or weeks at a time. The proposal was similar to a provision in the p & m agreement. Mulvany testified that it was the practice of the Respondent in the o & t unit to grant vacation in blocks of at least a week at a time. Moreover, the Respondent's Manual states that "vacation periods of less than one week may be taken only if no increase in operating costs result and may not total more than one week." However, the Respondent refused to agree to vacation periods in blocks of a week or more. Lockwood said they wanted the flexibility to schedule vacations as they wished, including vacations which might run Monday, Wednesday, and Friday of one week and Monday, Wednesday, and Friday of the next week. He did not explain what operating need prompted this position. The Respondent also refused to agree to a union proposal, found in the p & m contract, which would permit senior employees first choice of vacations in 1 year and those with children in the 5–17 age bracket first choice in the selection of vacations in alternate years. The record is silent as to what claimed need for flexibility prompted a refusal to agree to this proposal. The transparent emptiness and arbitrariness of the Respondent's explanation for these bargaining postures make it clear that it had no reason for refusing to agree to these minor proposals other than a desire to frustrate agreement in general. In fact, after the strike was over, it did agree to the 1-week-at-a-time proposal but this occurred long after it had adopted the bargaining stance which preceded the walkout. Accordingly, I regard the failure of the Respondent to make honest claims and give honest explanations to justify its rejection of the Union's

demands on work hours and vacations as evidence of its overall subjective bad faith.

E. *The January 24 and 25 Offers on Wages and Term of Agreement*

The Respondent's bargaining stance throughout the negotiations was to preserve a so-called merit pay system, under which it would retain a virtually unlimited right to grant or withhold pay increases within broad ranges. Under the provisions of its management rights, grievance, and arbitration proposals, company determinations on such increases would be unreviewable. Because Respondent also did not and would not agree to a classification system which assigned particular jobs to any particular pay classification, the starting point its compensation system would likewise remain wholly at its discretion, since the Respondent would remain free to peg any job into any pay category. The Union rejected these proposals, individually and taken in tandem, and pointed out to the Respondent that the wage proposal which was made in December would result in a situation in which only three members of the unit would get a raise under the existing classification system. The Respondent countered with a 1-year, lump sum bonus proposal and then purportedly answered the Union's other objection submitting, on January 24, a pay proposal which, *inter alia*, assigned specific salaries to each bargaining unit member. The overall raise accorded by these 23 separately stated salaries was about 4 percent, although some employees would receive percentage raises above their current salaries which were higher than others.

This unique if not unprecedented proposal should not be condemned because of its novelty. However, the effect of a proposal specifying contract rates for each unit member placed the Union in a position of bargaining individualy for each employee and of saying, either by agreement with the Company or by counterproposal, that one bargaining unit member might be entitled, for example, to a 3-percent raise while another unit member was entitled to a 6-percent raise. Thus, the net effect of the Company's proposal was to force the Union to pit one unit member against another by prompting an evaluation at the bargaining table of each individual's raise in comparison with every other raise. This type of proposal is not collective bargaining but individual bargaining and would transform the Union from a collective-bargaining agent into an individual bargaining agent. It would predictably instill dissention in union ranks because, if accepted, a comparative ranking of all members by union spokesmen would be essential to any meaningful union response. Such a proposal was predictably unacceptable and was in fact unacceptable.

The Company's final package had another noteworthy wrinkle. In addition to individually stated salaries, it also included provisions for a 1-year, lump sum bonus and a 2-year contract term. Aside from merit increases, which are outside the scope of any contractual commitment, the acceptance of this proposal could mean that, as far as contractual guarantees were concerned, employees would be making less during the second year of the contract than during the first year, since no in-grade or second-year increases were provided for and a lump-sum bonus, amounting to an additional 4 percent of base salary, would not be paid during the second year. A proposal having effect of providing employees, in an era of rampant inflation, with less guaranteed money during its second year than its first year is a ludicrous offer and predictably unacceptable.

The Respondent then coupled this proposal with what it called a wage reopener at the end of the first year. However, the proposed wage reopener could not be enforced by strike action or resort to the grievances machinery. It was a nonstrikeable, nonarbitrable reopener, the net effect of which would be that the Respondent was free from any contractual obligation to grant an increase during the second year and could in fact lower overall compensation, while the Union would be powerless to do anything about it. Any increase which the Respondent felt disposed to grant after the first year would be a matter of grace, not a matter of right. There is a certain cuteness about this proposal, when seen in conjunction with other related salary proposals, but it did not strike the Union in that fashion when it was placed on the table. Bergeron's reply was that the proposal for a nonstrikeable reopener was an insult to the integrity of the Union and he rejected it forthwith. Such a proposal is but another stone in the mosaic of bad faith which was being pieced together by the Respondent during the course of 22 negotiating sessions.

F. *Management Rights and No-Strike Clause*

In extolling the virtues of contractual grievance and arbitration machinery, the Supreme Court stated in *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 576 (1961), that:

> The present federal policy is to promote industrial stabilization through the collective-bargaining agreement. A major factor in achieving industrial peace is the inclusion of a provision for arbitration of grievances in the collective-bargaining agreement.

Before that time, in *Textile Workers Union of America, AFL-CIO* v. *Lincoln Mills of Alabama*, 353 U.S. 448, 455 (1957), the Court said: "Plainly the agreement to arbitrate grievance disputes is the *quid pro quo* for an agreement not to strike." While it may be federal policy to provide for arbitration of grievances in a collective-bargaining agreement, it was not the Respondent's policy, at least with respect to the particular bargaining unit involved in this case.[22] With respect to violations other than discipline or discharge arising in its Oak Point o & t unit, Respondent's attitude was if you don't like it, sue us. However, it wished to reserve to itself the right to a quickie arbitration in the event that any employee violated the no-strike clause. At the same time, its management's rights proposal would give the Company unilateral control over starting and quitting time, job classifications, work rules, promotions and demotions, and its merit wage proposal, discussed above, would give it uni-

[22] Other labor contracts in the record signed by the Respondent in other bargaining units do contain grievance arbitration provisions.

lateral control over wage increases above the individual rates proposed for inclusion in the contract.

At the time of the strike, the Respondent's position was to insist upon a broad no-strike clause, with grievance and arbitration provisions limited to matters of discipline and discharge and with the Union excluded from the initiation of grievances for any contract violations, including contract violations of a general nature which might not give rise to what might be called an individually aggrieved employee. Wage increases above the acceptable performance level would be the unilateral prerogative of management and a determination of whether an employee had reached that level of accomplishment would also be nongrievable. Lockwood explained at the hearing that if the Union had a complaint not covered by the agreement, it had a statutory right to present it to management. However, he made no such explanation or argument at the bargaining table. A "zipper" clause proposed by the Respondent provided that the agreement, with its limited grievance and arbitration clauses, constituted the entire agreement between the parties. When pressed on the issue of a grievance procedure *dehors* the contract, Lockwood was vague as to the details of its existence. Assuming that such a statutory right was not waived by the "zipper" clause, Lockwood gave no rational explanation as to why the Respondent would prefer two grievance procedures—one mandated by a statute and the other established by contract when its basic objection to the Union's proposals was that grievance and arbitration activity in the p & m unit was too costly and time consuming. His testimony on this subject bordered on the absurd. At the time of the strike, Respondent continued to insist upon broad management rights and no-strike clauses coupled with a severely restricted grievance and arbitration proposal and a wide-ranging merit increase proposal. In the cases cited above, such a combination of proposals has repeatedly been found to contain the element of bad faith because they serve to withdraw vast areas of mandatory subjects of bargaining from the bargaining table. Lockwood's explanation of the Respondent's position concerning dual grievance machinery serves only to bring these elenents into sharper focus and adds to the factors noted above the additional element of a dishonest claim.

G. *Benefits*

The Respondent's companywide benefit plan covers a large number of cost items which are mandatory subjects of bargaining. Respondent oirginally sought to remove these matters from the bargaining table with a proposal giving it the unilateral right to change any provisions thereof during the contract term, subject only to notification to the Union of its action. Its fallback position, and the one on the bargaining table at the time of the strike, was that it would not lower the general level of benefits during the contract term. It made no proposal which would require it to bargain concerning increases or decreases in benefits during the contract term. Its explanation of this vague clause makes it clear that the standard of "general level of benefits" was so broad and so susceptible of varying interpretations as to be meaningless. At first Lockwood said that this phrase meant the Respondent would not lower its financial contributions to these plans during the contract term. Later he said that the phrase meant that the Respondent would see to it that all the benefits in the plan, when considered in their totality, would not be lowered, even if the cost of maintaining them should increase during the contract term. Aside from this contradictory position, the phrase proposed by the Respondent to meet the Union's objection to its initial offer on benefits is so vague as to be unenforceable. How does one measure a change in hospitalization against a change in the pension plan, to come out with the same level of benefits? How does one measure an increase in a supplemental life insurance benefit against a possible decrease in the stock option plan to come out with the same level of benefits? According to other company proposals, this elastic standard would not be subject to grievance and arbitration, so if the Union did not agree to a company explanation that a change during the contract term in the benefit plan did not in fact lower the level of benefits in existence on the day the contract was executed, its only recourse would be expensive and time-consuming litigation. The addition by the Company of this new language was a facile but empty response to cogent criticism leveled at its initial proposal, criticism which exposed the initial proposal to the charge that the Respondent was trying to avoid bargaining at all in the very significant area of fringe benefits. After coming up with the language cited above, the Respondent was still trying to avoid bargaining about benefits.

H. *Seniority*

Respondent attempted to define seniority as continuous company service anywhere in the SOCAL corporate system, thereby conferring possible benefits in the contract concluded on this unit upon persons employed in other bargaining units by giving preference to individuals who are strangers to the Oak Point plant. It modified the impact of its definition of seniority by according to seniority little, if any, weight in its personnel determinations. Seniority would mean nothing under the Respondent's merit wage proposals. It would have importance only with respect to layoffs and recalls and then, as the General Counsel put it, only after the Respondent exercised "complete control to evaluate all pre-conditions to the application of the objective seniority date." Respondent's seniority proposals were so much fluff. If accepted, they would mean nothing and confer nothing upon employees in exchange for what the Respondent was seeking from the Union. A discussion of meaningless proposals is a waste of time. The presentation and discussion of meaningless proposals is simply another expression of the Respondent's intention to avoid contractual commitments in the course of collective bargaining. Its seniority proposals, both in their original and matured forms, fall into this category.

I. *Miscellaneous Conduct*

Under cases cited above, the granting of individual wage increases to unit members during the course of collective bargaining, without first notifying the Union and

seeking to bargain with it, is a *per se* violation of Section 8(a)(5). Under a line of Board cases involving charges of interference and violations of Section 8(a)(1) during preelection campaigns, an employer can successfully defend unilateral wage increases in an unrepresented unit on the basis that the granting of such increases is a regular and recurring aspect of its wage program and was not timed so as to interfere with protected activities during an organizing effort. No such defense is available to this Respondent concerning the five wages increases which it granted to selected members of the bargaining unit between July and October 1977 after the Union herein became certified. It had the obligation to notify and to bargain with the Union concerning these increases, even if they were granted pursuant to a previously established wage program, since any program which might be the predicate and justification for the increases is itself a mandatory subject of bargaining. At least two of the increases in question could not be justified even under the rationale suggested above as they were wholly discretionary increases, even under the terms of the Respondent's existing salary program. The Union did not learn about these increases until it received information from its bargaining unit members that the increases had been put into effect. In some instances, the information came months after the increases had been granted. By granting these increases, the Respondent simply acted as if the Union were not the bargaining agent of its clerical employees and as if it had no duty to bargain with the Union over wages. Not only did this action, repeated on five occasions, violate the Act in and of itself, it also evidenced the cavalier attitude the Respondent took toward the Union and toward its obligations under the Act.

Normally, the alleged mistreatment of an individual employee by management is, in an organized and represented unit, a subject for the grievance machinery. Indeed, the whole purpose of contractual grievance machinery is to take dispute involving individual employees and channel them into a fair, efficient, and expeditious mechanism for resolution, thereby permitting high-level negotiators to devote their time and energy to issues of general application throughout the unit. Where, as here, no such machinery exists, the treatment of individual employees by management in the course of their employment falls into the category of wages, hours, and terms and conditions of employment which Section 8(d) of the Act estalishes as mandatory subjects for discussion during the course of collective bargaining. Under this set of circumstances, individual grievances are as much a part of a proper agenda at the bargaining table as a general wage increase or a proposal for a no-strike clause.

Late in February, when tensions were running high in the clerical unit, Mulvany and Naquin, the chairman of the bargaining committee, had a dispute at the plant over the appearances of a piece of disparaging literature which Mulvany felt was inspired by the Union. Naquin felt that Mulvany treated him abusively during the course of their discussion, especially when Mulvany ordered him to leave the office. A determination of the facts of this dispute and the propriety of Mulvany's action are not the province of this proceeding. What is of concern in an unfair labor practice case is that, when Bergeron brought this question up at the February 23 negotiations and expressed disapproval of Mulvany's action, Lockwood and Mulvany refused to discuss the matter with him and in fact got up and walked out of the room, saying they would only discuss this question at the plant. Bergeron's complaint about the treatment of Naquin by Mulvany is a classic grievance which the Respondent was under a manadatory duty to discuss the Bergeron, inasmuch as there was no grievance machinery in existence to resolve the question. Neither at the bargaining session nor at the hearing in this case did the Respondent present any reason why the matter could not have been, or should not have been, discussed on the occasion when Bergeron brought it to their attention. The refusal of Lockwood and Mulvany to discuss the Naquin complaint was a *per se* violation of the Act which provided a further adverse reflection on the Respondent's view of its bargaining obligation. This abrupt behavior involved the chairman of the negotiation committee, was inflammatory in character, and took place at criticial moment in the course of negotiations. It was known to various members of the bargaining unit, and certainly to the chairman of the committee 3 days later when a strike vote was taken.

J. *Certain Defenses Asserted by the Respondent*

Respondent attempts to avoid the onus for a breakdown in bargaining and what ensued thereafter by pointing a finger at the Union, claiming that it was the Union's rigid insistence on a general arbitration and other matters that brought out the impasse in this case. The facts simply do not support this position. The Union's consistent and repeated position was that it had to have some means of policing a contract after it was concluded. It could not leave the determination of matters normally a part of collective bargaining to an exclusive and unilateral determination by the Respondent. Far from being rigid, its position in this regard was ambivalent. The Union would have to have either arbitration or a right to strike, and while it much preferred arbitration, it did not insist on this means to the exclusion of an alternative method. If a Union did not have some means of policing a contract once it was concluded, it would in effect be withdrawing from the bargaining unit and abandoning its legal obligation to its constitutency during the contract term. This the Respondent had no right to ask it to do.

One of the Union's later proposals was a suggestion, discussed briefly, that the establishment of new job classifications during the contract term be made the subject of arbitration if such matters could not be agreed upon by both parties. Respondent calls this proposal interest arbitration and argues that the Union was in effect violating Section 8(d) by insisting to impasse upon what the Board has held to be nonmandatory subject of bargaining.[23] The proposal advanced by the Union was limited to a call for arbitration of any disputed job classifications which might be created during the contract term. It

[23] *Columbus Printing Pressmen & Assistents' Union No. 252*, 219 NLRB 268 (1975).

made no proposal in this or any other area for arbitration of unresolved negotiable matters during a future contract term. As interest relates only to determinations by a stranger to negotations of bargainable matters arising during a future contract term[24] the Respondent's contentions in this regard are irrelevant to the facts of this case.

At the hearing the Respondent presented several matters in support of its bargaining posture which it did not present at the negotiations themselves. While this effort reflects favorably upon the ingenuity and diligence of counsel, it says nothing for the *bona fides* of the negotiators in pressing their points at the bargaining table. Two contracts entered into by the Respondent and other locals of the OCAW covering plants in California were introduced at the hearing—though not at negotiations—in support of the contention that the Respondent's position on items such as managements rights was not so far out as the General Counsel claimed, since similar clauses could be found in existing contracts entered into by the OCAW in other units. What this argument fails to take into consideration is that a comparison of the California contracts with the Respondent's offers to its Oak Point clerical employees shows far greater overall generosity and willingness to undertake contractual commitments on basic subjects of negotiation in the California units than were ever forthcoming during 22 negotiating sessions covering the unit at issue herein. A collective-bargaining agreement is a large but seamless web. Bits and pieces cannot be torn from one fabric and measured off against remnants of another to establish fairness through a comparison of isolated fragments.[25]

K. *A Summary of the Respondent's Bargaining Position*

This case involves a large national enterprise—part of an even larger conglomerate—employing some 38,000 people which was unable to come to terms with 23 clerical employees who work for it in one of its many production and distribution facilities. The ultimate question is whether it was unable to come to terms in this bargaining unit because of the vicissitudes of collective bargaining or because it was unwilling to own up to its obligation to deal with its employees as the law requires. As found above, the Respondent proposed to the Union herein contract provisions which would have required the Union to surrender its role as a bargaining agent. It sought unilateral control over most wage determinations and all fringe benefit determinations, sought complete authority to establish work rules and working hours, sought to exclude the Union from any say in promotions, layoffs, and recall, sought to deny union representatives any contractually established rights to enter the plant, post many notices, or talk to employees; sought an all-encompassing managements rights provision and asked the Union in exchange to commit itself to forego both strike action and arbitration over most disputes which might arise during the contract term. Moreover, the Respondent granted wage increases to unit members without consulting the Union, refused even to discuss a grievance involving the chairman of the Union's negotiating committee and the plant manager, gave frivilous and nonexistent reasons for refusing to incorporate into the contract existing plant practices, seized upon minor matters to erect obstacles to agreement, wasted months of time in making proposals and counterproposals on basic issues, and engaged in a sophisticated effort to prevent the Union from being in a position even to make an intelligent and sensible wage offer based upon a correct evaluation of the job content of unit members. Respondent also made a predictably unacceptable offer of individual wage rates and coupled them with provisions which would have permitted an actual reduction in take-home pay during the second year of the contract through the absence of any mandated bonuses. It then offered an insulting and meaningless proposal for a nonstrikeable wage reopener at the end of the first contract year. It failed to advance at negotiations explanation for its positions which it presented a year later at an unfair labor practice hearing and often responded to union requests to justify its positions with abrupt replies which were the equivalent of no explanation or "take-it-or-leave-it." These factors, as well as the other events outlined in the analysis herein, demonstrate clearly that the Respondent went to the bargaining table in this unit to toy with the Union, not to negotiate a contract, and that it was determined, as Mulvany put it to Bergeron on November 1, to continue to "do as it damned well pleased." Accordingly, I conclude that the Respondent herein was guilty of overall subjective bad faith in bargaining with the Union and thereby violated Section 8(a)(5) of the Act.

L. *The Character of the Strike Which Began on February 27*

As early as October 1977, the Union began to question the seriousness of the Respondent's bargaining posture and repeated these complaints with greater vigor as negotiations wore on. In mid-January, at a meeting of its members, union representatives told unit members that they were seeking legal advice concerning the filing of an unfair labor practice charge. At the February 26 meeting, before a strike vote was taken, a considerable discussion took place concerning the progress of negotiations. The chairman of the negotiating committee, Naquin, told the employees assembled at the OCAW Hall in Marrero that he felt that the Company was not bargaining in good faith and that he felt that there was no alternative but to strike. The membership voted 14 to 1 to engage in a strike.

Union complaints about bad-faith bargaining and union evaluations of company bad faith do not establish the ex-

[24] *Id.* at 280, fn. 3, enfd. 546 F.2d 1161 (5th Cir. 1976).

[25] In the Board's evaluation of its motives in these negotiations, Respondent seeks high marks for having agreed to a checkoff of union dues, a high priority union demand which is often held back by management negotiators as a last ditch tradeoff. Disputes over checkoff have often been the centerpieces in refusal-to-bargain cases. See, for example, *N.L.R.B.* v. *United Steelworkers of America, AFL–CIO [H.K. Porter Co., Inc.]*, 397 U.S. 99 (1970). It should be remembered that, whatever its value to a union, checkoff is not a cost item to an employer. Moreover, checkoff has value to a union only when there are union members in a bargaining unit. As of this time, there are only 2 union members in the Respondent's 23-employee Oak Point clerical unit. There is much in the record to suggest than the Respondent foresaw this eventuality before the strike when it agreed to check off union dues in the o & t unit.

istence of bad faith. However, where, as here, bad faith or surface bargaining has been found in fact to have taken place, such complaints serve to establish a causal connection between the Respondent's violation of the law and the strike which was called following such violations. Accordingly, I conclude that the strike which began on February 27 was caused or prolonged by the Respondent's unfair labor practices and that the employees who participated in the strike were unfair labor practice strikers. In accordance with long-settled rules dating back to the *Mackay Radio* case,[26] such strikers, are, upon unconditional application, entitled to full and complete reinstatement to their former or substantially equivalent positions, even if reinstatement requires the employer to discharge individuals who were hired during the strike to take their places. It is undisputed that, on May 17, all 15 strikers made an unconditional application for reinstatement and that 14 offers were rejected because replacements had been hired during the strike. Lloyd F. Capdeville and Gerald A. Perez were ultimately offered and accepted positions but it is unclear from the record whether such offers constituted full and complete reinstatement. By failing and refusing to grant full and complete reinstatement to returning unfair labor practice strikers, the Respondent herein violated Section 8(a)(3) of the Act. I so find and conclude.

Upon the foregoing findings of fact, and upon the entire record herein considered as a whole, I make the following:

CONCLUSIONS OF LAW

1. Respondent Chevron Chemical Company is an employer engaged in commerce and in an industry affecting commerce, within the meaning of Section 2(2), (6), and (7) of the Act.

2. Oil, Chemical, & Atomic Workers International Union, No. 4–447, and Oil, Chemical, & Atomic Workers International Union are, respectively, labor organizations within the meaning of Section 2(5) of the Act.

3. All office clerical employees, including the engineering clerk, the lead office assistant in the accounts payable department, and the lead accounting assistant in the production-inventory department, who are employed by the Respondent at its Oak Point Plant at Belle Chasse, Louisiana, excluding all production and maintenance employees, laboratory employees, professional and technical employees, draftsmen, engineering assistants, confidential employees, office assistant (safety and administrative services), guards, and supervisors as defined in the Act, constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act.

4. At all times material herein, Oil, Chemical, & Atomic Workers International Union has been the exclusive representative for purposes of collective bargaining of all of the Respondent's employees employed in the unit described above in Conclusion of Law 3.

5. By failing and refusing to bargain collectively in good faith with the Union as the exclusive collective-bargaining representative of the Respondent's employees in the unit described above in Conclusion of Law 3, the Respondent herein has violated Section 8(a)(5) of the Act.

6. By failing and refusing to recall and/or fully reinstate to their former or substantially equivalent employment Garnett L. Anderson, Bettie L. Beltz, Barbara A. Borries, Lloyd F. Capdeville, Louise J. Duplessis, Alvin L. Hebert, R. A. Henning, Marsha A. Hill, Steward A. Jenkins, Jody M. Knight, Arnold F. Lassere, R. C. Naquin, Gerald A. Perez, Larry H. Reiss, and Kathleen A. Rink because they had engaged in an unfair labor practice strike, the Respondent herein has violated Section 8(a)(3) of the Act.

7. The aforesaid unfair labor practices violate Section 8(a)(1) of the Act and have a close, intimate, and substantial effect upon the free flow of commerce, within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has committed certain unfair labor practices, I will recommend that it be required to cease and desist therefrom and to take other actions designed to effectuate the purposes and policies of the Act. It is the Board's established policy to require employers to reinstate unfair labor practice strikers within the 5 days after said strikers have made a full and unconditional offer to return to work. I will recommend such a provision in the Board's order. I will recommend a broad 8(a)(1) order designed to suppress any and all violations of that section of the Act. I will further recommend that the Respondent be directed to bargain in good faith with the Union and that the date of the certification year be extended for a period of 1 year from the date upon which such bargaining commences. *Capital Rubber Specialty Co., Inc.*, 198 NLRB 260 (1972).

I will also recommend that the Respondent be required to offer full and immediate reinstatement to all 15 individuals named in paragraph 8(a) of the complaint which was issued herein on September 22, 1978, to their former or substantially equivalent positions and that it also be required to make them whole for any loss of pay or other benefits which they have suffered by reason of the discrimination practiced against them, beginning on May 22, 1978, to be computed in accordance with the *Woolworth* formula,[27] with interest thereon calculated in accordance with the adjusted prime rate used by the U.S. Internal Revenue Service to compute interest on tax payments. *Florida Steel Corporation*, 231 NLRB 651 (1977); *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962). I will recommend that the Respondent be required to recognize and bargain collectively with the Union as the duly designated representatives of its employees, and that it post the usual notice, advising employees of their rights and of the results of this case.

[Recommended Order omitted from publication.]

[26] *N.L.R.B.* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938).

[27] *F. W. Woolworth Company*, 90 NLRB 289 (1950).